U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

DATE: MAR 3 0 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) rejected the petitioner's untimely appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts. The petitioner seeks employment as a fashion model. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner failed to establish that she qualifies for classification as an alien of exceptional ability in the arts, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

The petitioner filed the Form I-140 petition on her own behalf on September 9, 2008. The director denied the petition on Tuesday, January 26, 2010. The director received the petitioner's appeal 35 days later, on Tuesday, March 2, 2010. On May 2, 2011, the AAO rejected the appeal as untimely, as required by the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.3(a)(2)(i). The AAO also concluded that the petitioner's untimely appeal did not meet the requirements of a motion to reopen or to reconsider, and therefore the AAO declined to treat the appeal as a motion under the USCIS regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

The USCIS regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that a motion must include a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding. The petitioner's filing does not include this required statement.

On motion from the AAO's decision, counsel states:

> The decision of the Director advising Petitioner of the late filing comes as a tremendous shock and surprise. Significantly, FedEx confirmed that the documents were shipped on February 25, 2010. . . . Petitioner requested next day delivery of the documents. Therefore the Notice of Appeal should have been received on February 26, 2010, the following business day. However, FedEx, inexplicably and unbeknownst to counsel, did not deliver the package until March 2, 2011, contrary to counsel's explicit shipping instructions and reasonable expectation of next day delivery. . . .
>
> [I]t is respectfully submitted that the Notice of Appeal was sent to the AAO by overnight courier several days in advance of the filing deadline. Additionally . . . the 33rd day (February 28, 2010) actually fell on the intervening weekend. Hence the appeal time should be automatically extended to the next business day which was actually **March 1, 2010**. Thus, the Notice of Appeal was received a mere one (1) day after the 33rd day from the Director's written decision – and due to no fault of Petitioner or counsel. . . .

> We submit that the instant appeal should be adjudicated on its merits rather than decided based solely on a procedural defect inexplicably caused by the courier, FedEx.

(Emphasis in original.) On Form I-290B, counsel refers to the latest filing as a motion to reopen and a motion to reconsider the AAO's decision. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Counsel states no new facts on motion, and provides no new evidence. The petitioner submits a copy of the FedEx airbill from February 25, 2010, but this document was already part of the record, having accompanied the initial filing of the appeal. Likewise, the chronology of the appellate filing does not comprise new facts. Instead, counsel simply repeats information already available in the record of proceeding. Therefore, the petitioner's filing does not meet the requirements of a motion to reopen.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Under the regulation quoted above, the petitioner must successfully "establish that the decision was incorrect." It cannot suffice for the petitioner simply to attempt to establish it. Counsel cites case law in support of the motion, but the filing does not qualify as a motion to reconsider unless counsel's assertions are persuasive and supported by the case law counsel cites.

Counsel cites *Zhong Guang Sun v. U.S. Dep't of Justice*, 421 F.3d 105,108 (2nd Cir. 2005), which, counsel states, "held that the BIA can consider an untimely appeal if 'extraordinary and unique circumstances' interfered with timely filing." Counsel claims: "The facts in *Zhong Guang Sun* are strikingly similar to the case at bar," because the plaintiff in that case had submitted an appeal by overnight mail which the courier "delivered . . . five days late." Counsel also cited subsequent decisions from various circuit courts, stating that they followed the same logic: *Khan v. Department of Justice*, 494 F.3d 255 (2d Cir. 2007), *Siby v. Gonzales*, (2d Cir. 2007), *Oh v. Gonzales*, 406 F.3d 611, 612-12 (9th Cir. 2005) and *Salazar v. Mukasey*, F.3d 643 (6th Cir. 2008). Counsel also asserts:

> FedEx's failure to achieve timely delivery, which is a rare occurrence since they are known for their tremendous reliability and ability to deliver parcels in a timely manner, "may well, indeed, fall within the realm of the 'extraordinary' if not the 'unique.'" See *Siby v. Gonzales, 230 F. App'x 538, 541 (6th Cir. 2007) (quoting Zhong Guang Sun, 421 F.3d at 111).*

In *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006), the Board of Immigration Appeals (BIA) cited *Sun* and *Oh* (*Id.* at 990) and stated:

> In *Sun v. U.S. Dep't of Justice*, *supra*, the Second Circuit agreed with the Ninth Circuit that an overnight delivery service's failure to timely deliver a Notice of Appeal can constitute an extraordinary circumstance excusing an alien's failure to comply with the 30-day time limit for filing an appeal. The alien in that case placed his Notice of Appeal with an overnight delivery service 1 day before the deadline for filing the appeal. The court stated that an alien's use of an overnight delivery service is recognized as a way of insuring timely delivery and "strongly suggests to us that the failure of such an effort to achieve timely filing may well, indeed, fall within the realm of the 'extraordinary.'" *Id.* at 111. The court did not find that such an extraordinary circumstance existed in that case, but rather remanded the record for us to reconsider the issue.

The BIA noted that the court in *Oh* cited the *BIA Practice Manual*, which states, at section 3.1(b)(iv):

> **Delays in delivery.**—Postal or delivery delays do not affect existing deadlines, nor does the Board excuse untimeliness due to such delays, except in rare circumstances. Parties should anticipate all Post Office and courier delays, whether the filing is made through first class mail, priority mail, or any overnight or other guaranteed delivery service.

The BIA then reasoned:

> although a delivery delay might excuse untimeliness in a rare case, such as where the delivery was very late or caused by "rare" circumstances, the *Practice Manual* makes clear that, in general, such delays do not affect deadlines. The parties cannot point to such delays to excuse untimely filings, but should instead anticipate the possibility that the guaranteed delivery might fail. In a case such as the one before us, where the appeal was placed with an overnight courier service, at most, 48 hours before the filing deadline, we do not find the fact that delivery was a day or 2 past the "guaranteed" date to be a "rare" circumstance that would excuse the late filing. Such delays are not "extraordinary" events.
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> Meaningful filing deadlines are as critical to the smooth and fair administration of the Board as they are to the courts, particularly given the extraordinary volume of appeals, motions, and other filings that must be efficiently processed, tracked, and adjudicated. . . .
>
> The Supreme Court has clearly held that filing deadlines must be strictly applied. *United States v. Locke*, 471 U.S. 84 (1985). While recognizing that such deadlines "necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them," the Court has emphasized that if the deadlines are to have any meaning, they must be enforced. *Id.* at 101. According to the Court, "A filing

> deadline cannot be complied with, substantially or otherwise, by filing late–even by one day." *Id.*
>
> The regulations governing appeals to the Board, the statute governing administrative appeals in asylum cases, and the authority of the Supreme Court all require that filing deadlines be strictly enforced and thus that appeals be timely filed. Neither the statute nor the regulations grant us the authority to extend the time for filing appeals. We therefore do not agree with the court's suggestion in *Oh v. Gonzales*, *supra*, that we have the authority to extend the appeal time. *See Matter of Ponce de Leon*, 21 I&N Dec. 154, 158 (BIA 1996; A.G., BIA 1997) (stating that we only have such authority as is provided by statute or delegated to us by the Attorney General in the regulations). . . .
>
> [S]hort delays by overnight delivery services, while certainly not the norm, are not in and of themselves "rare" or "extraordinary" events, and appellants must take such possibilities into account and act accordingly.

Matter of Liadov, 23 I&N Dec. 992-93. The BIA distinguished between the plaintiff in *Oh* and the alien in *Liadov*. In *Oh*, the alien, through counsel, mailed an appeal on February 4, 2003, six days before the filing deadline, and the courier service did not deliver the filing until 20 days later, on February 24, 2003. *Oh v. Gonzales* at 612.

The BIA acknowledged: "In *Oh v. Gonzales*, the untimeliness of the alien's appeal could have been deemed to have resulted from 'rare circumstances' . . . [that] did not involve an attempted 'last-minute' filing." In contrast, the alien in *Liadov* had made what the BIA called an "eleventh hour" filing the day before the filing deadline, with a "delivery service [that] missed its guaranteed delivery date by, at most, 2 days." The BIA noted that the respondents in *Liadov* "have not established any 'rare' or 'extraordinary' events that required waiting until the last day or 2 of the mandated filing period and relying so completely on the delivery company's overnight guarantee." *Matter of Liadov*, 23 I&N Dec. 993.

On the spectrum that the BIA established, the present matter lies considerably closer to the facts of *Liadov* than *Oh*. The petitioner's initial appellate filing consisted of an eight-sentence statement, including the assertion that a supplement would follow. Counsel does not explain why the petitioner did not file this near-skeletal appeal until 30 days after the denial date. The filing arrived two business days after the intended delivery date, as in *Liadov*.

Turning to the more recent case law cited by counsel, *Khan v. DOJ* involved a one-day late delivery of an appeal. The court stated:

> If the BIA concludes that petitioner's justification for untimely filing does not present extraordinary or unique circumstances, it must provide a "reasoned explanation" for why this is so. *See Zhong Guang Sun,* 421 F.3d at 111. This explanation need not be

> elaborate or extensive, but it should at least acknowledge the availability of relief in appropriate circumstances.

Id. at 260. Significantly, the court in *Khan* did not find that the appeal was timely filed or that the BIA had to accept the untimely filing. The court found only that the BIA had not sufficiently explained why the untimely appeal did not involve "extraordinary or unique circumstances."

Salazar v. Mukasey involved an appeal filed two days before the filing deadline, which took eight days to deliver. *Id.* at 644. As in *Khan*, the court did not find that the petitioner's appeal was timely, or that the BIA must universally accept appeals that are mailed before the filing deadline, regardless of delays. Instead, as in *Khan*, the court held only that the BIA must "consider whether the circumstances presented by [redacted] were 'extraordinary or unique.'" *Id.* at 645.

Siby v. Gonzales, also cited by counsel above, involved a delivery delay of almost two years. *Id.* at 539. Even then, the 6th Circuit denied the petition for review in [redacted], finding no procedural error by the BIA.

The cited case law establishes, at most, that the appellate authority must consider whether or not "extraordinary or unique circumstances" prevented timely filing of the appeal. For the reasons stated above, the petitioner, on motion, has not shown that a delay of a few days in delivering an "eleventh hour" appeal constitutes "extraordinary or unique circumstances" that might compel the AAO to review an untimely appeal. Because the petitioner has not established that the decision was incorrect, the AAO must dismiss the motion to reconsider.

In the event that the AAO declined to consider the untimely appeal as timely, counsel requests that "the AAO treat the appeal with its supporting Brief and annexed documentary evidence as a motion to reconsider and/or reopen pursuant to 8 C.F.R. §§ 103.3(a)(2)(v)(B)(2), 103.3(a)(2)(iii), and 103.5(a)(5)(i)." There is a regulation, at 8 C.F.R. § 103.3(a)(2)(vii), that permits a petitioner to supplement a previously-filed appeal. There is, however, no parallel regulation to allow a petitioner to supplement a previously-filed motion. In order for an untimely appeal to qualify as a motion, therefore, it must qualify as a motion at the time of filing.

Jurisdiction over considering the untimely appeal as a motion would rest with the director, not with the AAO, because the untimely appeal sought to address a decision by the director. *See* 8 C.F.R. § 103.5(a)(1)(ii). As the AAO observed in its rejection notice, it is not apparent to the AAO that the untimely appeal, at the time of filing, qualified as a motion to reopen or to reconsider. The initial eight-sentence appellate statement contained no new facts and no new evidence, and did not establish that the director's decision was incorrect based on the record of proceeding at the time of the decision. Counsel simply claimed that the petitioner had submitted sufficient evidence to establish eligibility for the benefit sought.

ORDER: The motion is dismissed. The AAO's decision of May 2, 2011 is undisturbed.